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Nos. 93-517, 93-527, 93-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

On Writ of Certiorari to the New York Court of Appeals

BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

MARK E. CHOPKO *
General Counsel

PHILLIP H. HARRIS
Solicitor

U.S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

* Counsel of Record

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BRIEF *AMICUS CURIAE* OF THE UNITED STATES CATHOLIC CONFERENCE IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS*

The United States Catholic Conference advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of religious communities. Values of particular importance to the Conference are the protection of the first amendment rights of religious organizations and their adherents, and the proper development of this Court's Religion Clause jurisprudence.

This case offers this Court an opportunity to speak authoritatively on several important issues. First, the case allows for serious consideration of the Court's Establishment Clause jurisprudence which, both in substance and in process, has failed to serve the history and purpose of the first amendment. Second, by its decision here, the Court can indicate its willingness to continue proper deference to legislative accommodations that serve the public interest and protect religious values. Third, and most importantly, this Court can meaningfully advance the welfare of special needs children by endorsing appropriate ways to advance their education consistent with their parents' religious and cultural values.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

A hallmark of this Court's jurisprudence over the last several years has been increasingly to highlight the role of legislatures in resolving difficult societal problems. Whether on the subject of abortion, or in the area of church/state relations, or some similar topic, this Court has encouraged legislatures to seek solutions to the more

contentious problems facing this country. *See, e.g., Webster v. Reproductive Health Services,* 492 U.S. 490, 521 (1989); *Employment Division v. Smith,* 494 U.S. 872, 890 (1990). This Court has promised such legislative actions will not be disturbed on judicial review unless they plainly contravene some clear constitutional mandate. *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 128 (1809).

This case presents just such a legislative measure aimed at solving a complex problem facing the State of New York. 1989 N.Y. Laws, Chapter 748. This act of the Legislature was made necessary as much by this Court's confused Establishment Clause jurisprudence as by the conduct of the parties to this litigation. In *Aguilar v. Felton,* 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball,* 473 U.S. 373 (1985), this Court removed governmental remedial education programs from the premises of religious schools on the ground that such programs *might* advance religion in violation of the Establishment Clause of the first amendment. Those cases disenfranchised not only the very children who need remedial education, but also the special needs children of the Village of Kiryas Joel. *Aguilar* and *Grand Rapids* put at risk prudent and reasonable accommodations made by legislatures for the sake of their citizens, accommodations that respect religious needs but do not impair values protected by the Establishment Clause. Those cases effectively reversed the traditional presumption of constitutionality to which legislative actions are entitled and jeopardized accommodations, that, by their purpose and effect, do not remotely infringe constitutional guarantees. By doing so, *Aguilar* and *Grand Rapids* exacerbated the problems inherent in judicial attempts to apply this Court's 1971 tripartite test of purpose, effect, and entanglement. *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

In a very real sense then, this case was an inevitable consequence of the way this Court has allowed its Establishment Clause jurisprudence to develop, including under the *Lemon* test. But more than that, *Aguilar* and *Grand Rapids* have been used in this case to create a suspicion

that the New York Legislature was intentionally singling out religion for a special benefit. *Grumet v. Bd. of Educ. of Kiryas Joel Village School Dist.*, 81 N.Y.2d 518, 526-31 (1993). Some have therefore demanded that Chapter 748, which is facially neutral toward religion, be strictly scrutinized and narrowly construed in order to avoid an unconstitutional result. *Id.* at 532-40 (Kaye, C.J., concurring). Although this Court need not and should not allow accommodations of religion to meet with such suspicion, the fact is that Chapter 748 survives even such studied review. Chapter 748 furthers compelling interests by providing for the education of disabled children, protecting the legitimate religious beliefs and practices of citizens without offense to anyone, and protecting the rights of parents to educate their children. Several alternative means of serving these interests were considered and rejected by the New York courts in reliance on this Court's opinions in *Aguilar* and *Grand Rapids*. The action taken by the Legislature is therefore narrowly tailored to solve this seemingly intractable problem.

Aguilar and *Grand Rapids* were the underlying cause for special educational services being withdrawn from disabled children attending the Kiryas Joel Village schools. Those opinions have served not only to create the legal and political puzzle presented here, but also to diminish the educational services provided to countless needy children, in public and private schools, who pay for that loss in their daily lives. But for those decisions, the children of Kiryas Joel, and thousands of others across this nation, would receive needed secular educational services in their own schools. This *amicus* urges the Court to reconsider and abandon *Aguilar* and *Grand Rapids* in order finally to resolve the problem presented here and forestall future occurrences of such unfortunate and unnecessary litigation.

ARGUMENT

I. NEW YORK'S CHAPTER 748 IS A PERMISSIBLE AND NECESSARY ACCOMMODATION OF RELIGION UNDER THE ESTABLISHMENT CLAUSE.

This case presents the issue of whether a legislature may create a secular school district in a community consisting almost exclusively of citizens of the same religious group. Even though the respondents and the lower courts made the religion of the citizens of the Village and of the public school board the core issue, this case does not involve a prohibited "religious gerrymander." *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Instead this case presents a legitimate accommodation made necessary by a number of factors. The strongly held religious values of the Village citizens, the State's insistence that special education could only occur in public schools outside the Village, and the lack of clarity in this Court's jurisprudence each contributed to the need for this Court now to resolve the matter finally.

The course of this dispute pitted State and local educational authorities against the citizens of the Village of Kiryas Joel for over eight years. Those citizens, Satmar Hasidic Jews, educate their children, to the extent possible, in religious schools. But there are approximately 150 children in Kiryas Joel who suffer from mental retardation, deafness, spina bifida, emotional disorders, speech and language impairments, and other conditions, whose special education needs are the joint responsibility of their parents and of the State. Notwithstanding this Court's decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985),[1] the parents expected that special

[1] The educational program at issue in *Aguilar v. Felton* was Chapter 1 of the Education Consolidation and Improvement Act of 1981. 20 U.S.C. § 3801 *et seq.* That Act provided, among other things, remedial reading and mathematics for students who were both educationally and economically disadvantaged. For nineteen years, the program functioned on the premises of both public and private schools; it was never part of the curriculum of private

education of those children would continue in the Village. After *Aguilar* and *Grand Rapids*, the State took the position that such education could only occur in public schools, which were located outside the Village. Not surprisingly, the parents did not believe that solution consistent with their historic, cultural or religious values, or with their children's needs.

Litigation between the parents and educational authorities failed to resolve the impasse to anyone's satisfaction. The New York courts ultimately ruled that neither of the solutions proffered by the parties was mandated and strongly suggested a compromise be sought. *Board of Education v. Wieder*, 72 N.Y.2d 174 (N.Y. 1988). At that point the Legislature intervened, passing a law that created the petitioner Board of Education and enabling it to erect public schools in the Village to facilitate general education. 1989 N.Y. Laws, Chapter 748. Those children who are able attend the private religious schools in the Village; those having special needs now attend the public school. Why this solution, which works to everyone's benefit, should be challenged as constitutionally suspect under the Establishment Clause is difficult to square with the first amendment's history and meaning, or with this Court's encouragement that legislatures accommodate religion.

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schools and was expressly designed by the Congress to be an aid to students, not to the schools. After both a three-judge court and a district court upheld the program, the U.S. Court of Appeals for the Second Circuit invalidated the program as violative of the Establishment Clause. *Felton v. Secretary, U.S. Dep't of Education*, 739 F.2d 48 (2d Cir. 1984). At the same time, the panel lamented that the program had done "much good and little, if any, detectable harm." *Id.* at 72. On July 1, 1985, in two 5-4 decisions, this Court invalidated the New York Chapter 1 remedial education program and struck down a similar Grand Rapids School District program. *Aguilar v. Felton*, 473 U.S. at 408-14 (invalidating the New York program); *School District of Grand Rapids v. Ball*, 473 U.S. at 381-98 (invalidating the Grand Rapids program).

A. The History And Meaning Of The Establishment Clause.

Through the Religion Clauses, the Framers of our Bill of Rights attempted to protect two important values. First, they were concerned about the derogation of individual *religious liberty* if the State could sponsor particular religions or religious activity, to the exclusion or detriment of others. *See Lee v. Weisman*, 112 S. Ct. 2649, 2667, 2668-70 (1992) (Souter, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 91-106 (1985) (Rehnquist, J., dissenting). The Framers also sought to protect *institutional autonomy* of government and religious institutions. "The objective [was] to prevent, as far as possible, the intrusion of either [a State or a Church] into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). In doing so, they denied to churches the ability to interfere in the operation of government or the exercise of the power of governance. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). So too, they denied to government the authority to dictate to the churches how religion should be taught, practiced or governed. *E.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Where neither value is implicated, the Establishment Clause is not in danger of infringement. *See Zobrest v. Catalina Foothills School District*, 113 S. Ct. 2462 (1993).

This Court has also recently confirmed that legislatures, not the courts, should be encouraged to draw lines that accommodate religion. *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). What the Court *has* forbidden to legislatures is government "sponsorship, financial support, and active involvement" with religion. *Walz v. Tax Commission*, 397 U.S. at 668. What constitutes "sponsorship, support, or involvement" depends on the facts of a particular case. However, there is a "gray area" between the limits of the Establishment Clause and the commands of the Free Exercise Clause, what the Court has described as "*room for play in the joints* productive of a benevolent neutrality which will permit

religious exercise to exist without sponsorship and without interference." *Id.* at 669 (emphasis added). Government may go further than that which is commanded by the Free Exercise Clause to accommodate religion without running afoul of the Establishment Clause. *Id.* at 673 (citations omitted). Such accommodations are upheld because it is a demonstrated part of our history and tradition that government will adjust itself, if possible, to allow citizens to enjoy untrammeled religious expression. To rule otherwise would call into question a number of accommodations this Court has acknowledged and validated over the last fifty years. *E.g., Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 334, 340 (1987) (upholding religious exemption to Title VII of the Civil Rights Act of 1964); *Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 144-45 (1987) (providing unemployment compensation benefits to Sabbath observer does not violate the Establishment Clause).[2]

"[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder,* 406 U.S. 205, 214 (1972). The Clauses were included in the Bill of Rights "not as a protection *from* religion, but rather as a protection *for* religion. They were inserted in our Constitution largely because its framers felt that they were important to insure the continuance and the strengthening of religion, which could not flourish under

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[2] That Congress may choose whether to include or exempt persons from a statute on religious grounds as an accommodation is well established. *United States v. Lee,* 455 U.S. 252, 260-61 (1982); *Bowen v. Roy,* 476 U.S. 693, 712 (1986) (Burger, C.J.). That choice does not violate the Establishment Clause. *Bowen v. Roy,* 476 U.S. at 712 n.19; *Sherbert v. Verner,* 374 U.S. 398, 409 (1963). Likewise in an appropriate case, the government may exercise its discretion to limit accommodation to preserve desired neutrality without violating the Religion Clauses. *See Norwood v. Harrison,* 413 U.S. 455, 462 (1973).

American conditions if any State Church were either provided for or tolerated." A. Stokes, I *Church and State in the United States,* 556 (1950) (emphasis in original). As explained above, in deciding whether the Establishment Clause has been infringed, a court must be firmly convinced that the government has taken action clearly incompatible with the purposes and intent of the Clause as revealed through history and experience.

Over forty years ago, this Court held that government cannot exclude individuals from the benefits of public welfare legislation because of their faith, or lack of it. *Everson v. Board of Education,* 330 U.S. 1, 16 (1947). The Court cautioned that "we must be careful, in protecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [a State] from extending its general State law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Government must be neutral on religion and religious matters, not antiseptically so, but benevolently neutral, to allow for religious actions "without sponsorship and without interference." *Walz,* 397 U.S. at 669; *see Presiding Bishop v. Amos,* 483 U.S. at 335. A central theme in this jurisprudence is that accommodation of religious values is important to a free society. *Zorach v. Clauson,* 343 U.S. 306, 313-14 (1952). Legislatures are entitled to the benefit of the doubt unless it is clear that the challenged action is plainly incompatible with the Establishment Clause. Applying these historical principles to the law being challenged in this case, the creation of the Kiryas Joel School District passes constitutional muster.

B. The Creation Of The School District Is A Legitimate Accommodation Of Religion.

In creating the petitioner school district, the Legislature advanced a particular State interest, the education of special needs children. Those children were not attending available classes in the pre-existing public school district, in part, because of their parents' decision that the values expressed in the unique religious and cultural setting of

the Village were superior to the educational experience elsewhere. *Cf. Zobrest v. Catalina Foothills*, 113 S. Ct. at 2464, 2469 (parents' choice of religious school takes precedence). In addition, travelling to public schools outside the Village to obtain special educational services is disruptive to the educational process. It is also undisputed that the children themselves were ridiculed by other children attending the public school, causing further disruption to their education. *Grumet*, 81 N.Y.2d at 524. When confronted with this situation, the Legislature, to its credit, found a workable political solution. *Id.* at 524-25. Such an action would seem well within its role as arbiter of difficult and complex social questions, especially since deference to the legislative judgment, not judicial second-guessing, is well established. *E.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1809); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 113 S. Ct. 2217, 2239-40 (1993) (Scalia, J., concurring). Yet the appellate courts of New York chose not to defer to the State Legislature. Instead they attributed to the Legislature an intention to spend state resources to advance religion, a conclusion supported by nothing more than speculation.

Even if this Court were now to examine the supposed religious effects of Chapter 748, that law should still be ruled a legitimate accommodation of religion. In *Employment Division v. Smith*, this Court recognized—some would say encouraged—legislative accommodations such as Chapter 748. There, the Court refused to create a judicial exception to a law of general applicability, but noted "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[3] 494 U.S. at 890. Having encouraged legislative action to protect religious values, this Court must now affirm that it meant what it said. Such accommodations are legitimate, even mandated expressions of legislative authority.

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[3] *See, e.g.*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (1993).

The Establishment Clause was never intended to demand "hermetic separation." *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) (plurality). Legislatures are permitted to consider religion as one of the many values they must balance in resolving disputes. *Presiding Bishop v. Amos, supra.* Merely because a statute arguably results in some benefit to religion does not mean it must automatically be invalidated. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Rather, the legislation must be carefully scrutinized "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so." *Id.* (emphasis added). In this case, the law in question undoubtedly relieves a burden on the strongly held religious values of the Satmar Hasidic community. It does not risk denial of any individual's religious liberty; it requires no religious observance or even toleration. *Lee v. Weisman*, 112 S. Ct. at 2657-58. It allows only for self-government of a school district. It does not involve the State in religious matters, or cause religious dominance of secular government, so as to implicate the autonomy of either institution. *See Larkin v. Grendel's Den, Inc., supra.* It does not, therefore, deserve to be treated as anything other than a valid exercise of legislative judgment.

C. This Court's Establishment Clause Jurisprudence Contributes To Uncertainty About The Validity Of Legislative Action.

This Court has correctly insisted that the Establishment Clause be construed according to "what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. at 673. This accords with the well established view that the Court will construe the Constitution reasonably, taking words "in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Ultimately, "every clause in every constitution . . . must have a reasonable interpretation, and be held to express the intention of its framers." *Woodson v. Murdock*, 89 U.S. (22 Wall.) 351, 369 (1874).

Rather than sift facts and weigh circumstances in deciding whether an establishment of religion had actually occurred in this case,[4] the lower court struggled with the application of the tripartite purpose, effect, and entanglement test. *Lemon v. Kurtzman*, 403 U.S. at 612-13. In doing so, the court dramatically illustrated the difficulty both with this Court's substantive Establishment Clause case law and with the process by which this Court has addressed such questions. The court struggled initially over the question whether the *Lemon* test had been abandoned. *Grumet*, 81 N.Y.2d at 526-27; *id.* at 532 n.1 (Kaye, C.J., concurring), 549-50 (Bellacosa, J., dissenting). That analysis was necessitated by this Court's insistence that this "test" may be nothing more than a "signpost." *Larkin v. Grendel's Den, Inc.*, 459 U.S. at 123. In addition, no particular formulation of the test is so embedded in the Court's doctrine that it must be reflexively applied in every case. *Lynch v. Donnelly*, 465 U.S. at 678. Accordingly, whenever this Court applies, or does not apply, the *Lemon* test according to the dictates of changing majorities,[5] it contributes to the uncertainty that that test, some other test,[6] or no test[7] is now

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[4] *See* Glendon, *Law, Communities, and the Religious Freedom Provisions of the Constitution*, 60 Geo. Wash. L. Rev. 672, 678-81 (1992).

[5] *Cf. Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2148 & n.7 (1993), *with Zobrest v. Catalina Foothills School District*, 113 S. Ct. at 2464-69 (resolution of Establishment Clause claim without reference to *Lemon* only eleven days after deciding in *Lamb's Chapel* to retain the *Lemon* test).

[6] Justice O'Connor has offered an "endorsement" test as the measure of an Establishment Clause violation. *Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring). Justice Kennedy has suggested that "coercion" is a necessary ingredient of a violation. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655, 660-61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Justices Scalia and Kennedy offered a different measure in a concurring opinion in *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring, joined by Scalia, J.).

[7] *Marsh v. Chambers*, 463 U.S. 783 (1983); *Lee v. Weisman*, *supra*; *Zobrest v. Catalina Foothills School District*, *supra*.

the preferred means by which courts should adjudicate Establishment Clause questions. More to the point, the continuing criticism of the test by members of this Court [8] and by commentators [9] adds to this level of judicial uncertainty.

As currently conceived, this test constitutes a warrant for judges to stray far beyond their proper role and explore the motivations of legislatures; study the far corners of a particular action for some effects, real or imagined; or decide, subjectively, whether some particular involvement is "excessive." [10] After this Court's 1985 decision in *Aguilar v. Felton*, there seemed little doubt that the test was in many respects an excuse for applying a presumption of invalidity to legislative actions involving both government and religious entities.[11] Indeed, this case, which demonstrates only the involvement of a legislature resolving a political problem, is more than adequate illustration of the nature of the difficulties with this Court's Establishment Clause jurisprudence. More particularly, as discussed below, continuing efforts by lower courts to interpret and apply *Aguilar v. Felton* and *Grand Rapids v. Ball* will result only in more difficulties in the law and in the lives of citizens.

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[8] *See, e.g., Aguilar v. Felton*, 473 U.S. at 426-30 (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. at 108-13 (Rehnquist, J., dissenting).

[9] *See* Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409, 449-50 (1986). This *amicus* has, on numerous occasions, been critical of the *Lemon* test and urged its reformulation or abandonment. *E.g.*, Brief *Amicus Curiae*, in *Aguilar v. Felton*, No. 84-237 (1984).

[10] Chopko, *Religious Access*, *supra* note 9.

[11] Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 514 (1991).

II. NEW YORK'S CHAPTER 748 IS NARROWLY TAILORED TO SERVE COMPELLING CONSTITUTIONAL INTERESTS.

Over the last several years, this Court has begun to approach first amendment religion cases in a slightly different framework. The Court has examined the nature of the particular governmental action to see whether it singled out religion for some special benefit or detriment. Where religion was found not to have been accorded special treatment, the Court has not required heightened scrutiny. *Employment Division v. Smith, supra.* Where such special treatment was evident, the Court has looked with greater scrutiny and required the state to justify its action in greater detail. Indeed, this theme may be seen to link the three religion cases decided by the Court during the last Term. In *Lamb's Chapel, supra,* a school district allowed community groups to use school property unless they expressed a religious message. In *Church of Lukumi Babalu Aye, supra,* the City of Hialeah legislated against killing animals only if done as religious sacrifice. And in *Zobrest, supra,* a deaf student was excluded from benefits under the same federal program at issue in this case—the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*—only because he attended a religious school. Of particular importance, in *Zobrest* this Court noted that the Establishment Clause has never been held to invalidate a general governmental program that neutrally benefits individuals solely because the program may also provide some indirect benefit to religion or religious institutions. 113 S. Ct. at 2466-69. Because the IDEA distributes benefits neutrally to any qualifying child without regard to the nature of the school, religious or otherwise, the child attends, the State could not justify its refusal to pay for a sign-language interpreter for a deaf student attending a Catholic high school under that Clause. *Id.*

By contrast, the lower court in this case concluded that the creation of a school district in Kiryas Joel was not part of a general governmental program and did not neu-

trally confer benefits on the citizens of the Village. *Grumet*, 81 N.Y.2d at 530. The majority below implies that this alone is sufficient to find the law constitutionally suspect. In a concurring opinion, however, Chief Judge Kaye noted that such a conclusion does not automatically invalidate the law, it simply requires the application of a strict scrutiny analysis. *Id.* at 532-40. Under this analysis, Judge Kaye found that Chapter 748 was motivated by a compelling state interest (education of disabled children) but was not narrowly tailored to achieve that purpose. *Id.* at 532, 536-39. The first phase of Judge Kaye's analysis is correct—the New York law serves several compelling interests. What Judge Kaye failed to acknowledge is that, when faced with trying to apply this Court's opinions in *Aguilar v. Felton* and *Grand Rapids v. Ball*, the solution adopted by the State of New York *is* narrowly tailored and constitutionally sound.

A. Chapter 748 Serves A Combination Of Compelling State Interests.

No one disputes that Chapter 748 was enacted for the primary purpose of providing special educational services to disabled children, services that they are legally entitled to receive under the IDEA.[12] Likewise, there is no dispute, indeed it is generally assumed, that providing such special education to all children in need is a high and worthy goal of government. Chapter 748 also protects both first amendment rights and the rights of parents to direct the education of their children. Protection of those rights buttresses the conclusion that the law is a legitimate exercise of legislative authority.

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[12] There is no pretense, on the one hand, that the creation of the separate school district was for general administrative or budgetary reasons, nor is there any allegation, on the other hand that the State is trying to advance the growth of Satmar Hasidism among its Jewish citizens. The resolution of the dispute between Kiryas Joel and the Monroe-Woodbury School District—a dispute that was preventing children from receiving much needed services —was the clear reason for the passage of Chapter 748. *Grumet*, 81 N.Y.2d at 523-25.

1. Advancement Of Equal Educational Opportunities To Children With Disabilities.

Education of the handicapped is a national priority in part because of this Court's pronouncement that: "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms." This passage from *Brown v. Board of Education* 347 U.S. 483, 493 (1954), was quoted by the United States Senate when the Education for All Handicapped Children Act of 1975 (EHA) was adopted. S. Rep. No. 94-168, 94th Cong., 1st Sess. 6, *reprinted in*, 1975 U.S. Code Cong. & Ad. News 1425, 1430. In 1990, when the EHA was retitled the Individuals with Disabilities Education Act, Congress declared: "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law." 20 U.S.C. § 1400(b)(9). This purpose, to eliminate the discriminatory treatment of children with disabilities, also underlies the enactment of Chapter 748 by New York State.

From the time of this Court's decisions in *Aguilar* and *Grand Rapids* until the State of New York finally stepped in to resolve the dispute between the Village and the neighboring Monroe-Woodbury School District, the children of Kiryas Joel were not being treated equally but were in fact being subjected to disparate treatment precisely because of their religious practices. Just as the Orthodox Jew in Pennsylvania was subjected to a "cruel choice" between "his religious faith and his economic survival" by that State's Sunday-closing law, so too the parents of disabled children in Kiryas Joel have been forced into a "cruel choice" between their religious faith and their children's education.[13] *Braunfeld v. Brown*, 366

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[13] It was exactly this type of callous treatment that Congress thought it was abolishing when it enacted the EHA:

U.S. 599, 616 (1961) (Stewart, J., dissenting); *see also Goldman v. Secretary of Defense*, 739 F.2d 657, 660 (D.C. Cir. 1984) (Ginsburg, J., dissenting from denial of suggestion to hear case *en banc*), *aff'd*, 475 U.S. 503 (1986). Chapter 748 resolves this "choice" in a way that provides for special education without infringing religious values. Resolving the political problem to provide equal educational opportunities furthers a compelling interest.

2. Accommodation Of Religious Values And Parental Rights.

The first of the constitutional mandates served by the creation of the Kiryas Joel School District is the free exercise of religion. That government action accommodating the citizenry's right to engage freely in religious practice is an "interest[] of the highest order" cannot be disputed. *Church of Lukumi Babalu Aye*, 113 S. Ct. at 2233. It is indeed " 'the best of our traditions' to 'accommodate[] the public service to the[] spiritual needs [of our people].' " *Goldman*, 739 F.2d at 660 (Ginsburg, J., dissenting, quoting *Zorach v. Clauson*, 343 U.S. at 314). Indeed, as this Court has noted, protection of religious freedom predates "general acknowledgment of the need for universal formal education. . . . The values underlying [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admit-

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> This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.
>
> Parents of handicapped children . . . have begun to recognize that their children are being denied services which are guaranteed under the Constitution. It should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy.

S. Rep. No. 94-168, 94th Cong., 1st Sess. 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1433.

tedly high social importance." *Wisconsin v. Yoder*, 406 U.S. at 214. Therefore, if the creation of the new school district is viewed to benefit the religious practices of Hasidic citizens, such government action clearly serves the compelling state interest in the free exercise of religion.[14]

Moreover, since at least the 1920s, this Court has recognized that the right of parents to direct the education of their children is constitutionally protected. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Yoder*, this Court went even further, indicating that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Yoder*, 405 U.S. at 223. This special constitutional significance to the combination of free exercise and parental rights, or "hybrid situation," was reiterated in *Smith* where the Court indicated that even neutral laws of general applicability must face strict scrutiny when they restrict such a constitutionally powerful combination. 494 U.S. at 881 n.1. That same hybrid of free exercise rights and the rights of parents to direct the upbringing of their children has been at risk since this Court's decisions in *Aguilar* and *Grand Rapids* caused the loss of special education services to the disabled children of the Village. Those rights are vindicated in Chapter 748.

As the above discussion indicates, since neutral, generally applicable laws *restricting* hybrid rights must undergo strict scrutiny, then laws thought not to be neu-

[14] Accommodations of religion need not and should not be strictly scrutinized, as discussed in Argument I. The view of the lower court was that the Legislature perhaps unwittingly provided some religious benefits to the citizens of Kiryas Joel that should trigger additional scrutiny. It must be emphasized that this type of legislation is unlike the kinds of action that concerned the Court, for example, in *Lee v. Weisman*. Here no one is being coerced, directly or indirectly, to participate in or even tolerate *any* religious exercise or observance. 112 S. Ct. at 2655, 2657-58.

tral or generally applicable, but which *accommodate* hybrid constitutional rights, should undergo only a "reasonable relation" test in order to be upheld by this Court. *Yoder*, 406 U.S. at 213-36; *Smith*, 494 U.S. at 876-90. Nevertheless, since Chapter 748 also serves compelling interests and is narrowly tailored, its constitutionality cannot be doubted under either standard of review.

B. Chapter 748 Is A Narrow And Reasonable Response To This Court's Opinions In *Aguilar* And *Grand Rapids*.

In her concurring opinion below, Chief Judge Kaye concludes that Chapter 748 was not narrowly drawn because the Legislature could have just simply "enacted a law providing that the Monroe-Woodbury Central School District should furnish special education services to these children at sites not physically or educationally associated with their parochial schools." *Grumet*, 81 N.Y.2d at 538-39 (Kaye, C.J., concurring). Such a seemingly simple solution, however, ignores this Court's overreaching opinions in *Grand Rapids* and *Aguilar*, as well as the actual conduct of Monroe-Woodbury and the New York courts in reliance on those opinions. Chief Judge Kaye also misapprehends the importance of this Court's decision in *Zobrest*, decided just three weeks before the opinion below.

From the record below, one sad fact is abundantly clear:

> Prior to the decision of the United States Supreme Court in *Aguilar v. Felton* [citation omitted], the handicapped children living in Kiryas Joel received special education services from Monroe-Woodbury Central School District personnel in an annex to one of the Kiryas Joel religious schools.
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> * * * *
>
> In response to the *Aguilar* decision, the Monroe-Woodbury Central School District stopped providing the special education programs at the religious school annex.

Grumet, 81 N.Y.2d at 523-24. And to make matters worse, Monroe-Woodbury also concluded that, as a result of *Aguilar* and *Grand Rapids*, "it could furnish services to [the] children only in the public schools, and it proceeded to place them there. . . ." *Board of Education v. Wieder*, 72 N.Y.2d at 180. Agreeing with the Monroe-Woodbury School District, New York's Appellate Division relied on *Aguilar* and *Grand Rapids* to require that Village children receive services only "in the regular classes and programs of the public schools and not separately from public school students. . . ." *Board of Education v. Wieder*, 522 N.Y.S.2d 878, 883 (N.Y. App. Div. 1987).[15] Although this latter ruling was later modified by the Court of Appeals, it was in this posture that the matter came before the State Legislature. The legislators were, therefore, faced with a confused situation in which physically separate or mobile sites had been deemed unconstitutional and limiting special services to public schools only, if not constitutionally mandated, seemed at least permissible. The cause of this confusion was *Aguilar* and *Grand Rapids*; the narrowly tailored solution chosen by the Legislature was Chapter 748, the creation of the Kiryas Joel Village School District. Under the circumstances faced by the New York legislators in 1989, it was a reasonable, if not the only, solution.

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[15] In the first round of litigation between Kiryas Joel and the Monroe-Woodbury Central School District, the state trial court ordered Monroe-Woodbury to do precisely what Chief Judge Kaye later suggests: furnish special education and related services in a mobile or other appropriate site not physically or educationally identified with but reasonably accessible to the parochial school children. *Board of Education v. Wieder*, 512 N.Y.S.2d 305, 308 (N.Y. Sup. Ct. 1987). Unfortunately, the trial court's order was not long-lived. By the end of the same year, the Appellate Division had ruled that the solution ordered was "constitutionally impermissible." *Board of Education v. Wieder*, 522 N.Y.S.2d at 882. The basis of the Appellate Division's ruling was, of course, *Aguilar* and *Grand Rapids*. *Id.*

C. Overruling *Aguilar* And *Grand Rapids* Would Resolve This Dispute And Prevent Future Cases Such As This From Arising.

1. *Aguilar* And *Grand Rapids* Have Had Detrimental Effects On Numerous Government Programs.

Relying in large measure on *Aguilar* and *Grand Rapids*, the district judge in *Kendrick v. Bowen* concluded that participation of religious organizations in the Adolescent Family Life Act (AFLA)[16] was unconstitutional. 657 F. Supp. 1547, 1561-68 (D.D.C. 1987). This Court reversed and remanded, holding that Congress was within its constitutional discretion to decide that religious organizations could play a meaningful role in the development of services for adolescents. *Bowen v. Kendrick*, 487 U.S. 589 (1988). Charges that the program was being administered in an unconstitutional way such that it invited abusive practices were remanded with the direction that such charges had to be supported by evidence, not conjecture. *Id.* at 620-21. In so ruling, this Court corrected the misguided opinion in *Kendrick*, but did nothing to repair the district judge's twin blind guides—*Aguilar* and *Grand Rapids*—thus contributing to jurisprudential confusion.

In the meantime Congress, concerned about the detrimental effect of the *Aguilar* decision on the education of children most in need of special services, enacted remedial legislation to offset the impact of that opinion. 20 U.S.C. § 2727(d).[17] In addition to what school districts them-

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[16] 42 U.S.C. § 300z(a)(8)(B).

[17] The Senate Labor and Human Resources Committee reported:

> To comply with the Supreme Court's decision [in *Aguilar v. Felton*], schools have had to implement costly, disruptive, and creative procedures to serve private school children.
>
> The Committee strongly believes that these eligible children should be served. Service to eligible private school children has been a provision in law since its enactment in 1965. The Committee is very concerned that efforts to comply with the

selves have spent, since 1988 Congress has appropriated over $200 million to help defray the cost of capital expenses associated with alternative delivery methods, such as the mobile vans and leases of neutral sites necessitated by *Aguilar*.[18] This money could be better used to provide much needed instructional services to both public and private school students. Instead, the costs for alternative delivery methods decrease the amount of funds available to provide instructional services for all students, regardless of where they attend school. Although plainly beneficial to needy students and cash-starved school districts, this new legislation was just another complaint to add to the lawsuits spawned by *Aguilar/Grand Rapids*.

Much of that new litigation focused on the use of government-owned and controlled mobile vans being used for remedial education classrooms and the methods of cost allocation. A Missouri district court almost immediately invalidated both the parking of mobile vans on school yards, even in places remote from the private school, and the method of accounting for any additional

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Supreme Court ruling have resulted in a decline of about 35 percent in the number of private school children who are served.

S. Rep. No. 100-222, 100th Cong., 1st Sess. 14, *reprinted in*, 1988 U.S. Code Cong. & Ad. News 101, 114.

[18] M. Haslam, D. Humphrey, *Chapter 1 Services to Private Religious School Students* (U.S. Dept. of Education, 1993), 41 (approximately $161 million had been appropriated for capital expenses for fiscal years 1988-93). For fiscal year 1994, $41.434 million has been appropriated. H.R. Rep. No. 103-275, 103d Cong., 1st Sess. 72 (1993). Perhaps appropriately, the extra costs required to provide remedial education to needy parochial school students as a result of this Court's decision in *Aguilar v. Felton* have become known as "*Felton* costs." These "*Felton* costs" had to be taken off-the-top of a state's allocation of funds in order to provide actual services equitably to all needy students. The focus on costs is important. If these costs were not taken off-the-top of the allocation of Chapter 1 monies, but instead were assessed against the private school students' share of Chapter 1, services might have to be discontinued for a year or more. Many students would be unserved or would simply leave the private schools.

costs to provide these services. *Pulido v. Cavazos,* 728 F. Supp. 574 (W.D. Mo. 1989). Closely reading *Aguilar,* the district court came to the anomalous conclusion that a van parked directly in front of a parochial school, just a few steps from the entrance, but outside the school's property line was constitutional; a van parked across campus, out of sight of the school's entrance, but still on land owned by the school violated the first amendment. *Pulido,* 728 F. Supp. at 587-93. By contrast, a Kentucky district court upheld the delivery of services in off-premises mobile vans but invalidated the method of cost allocation. *Barnes v. Cavazos,* No. C80-0501-L(A) (W.D. Ky. Feb. 21, 1990). On appeal, the Eighth Circuit upheld both the use of mobile classrooms, no matter where parked, and the cost allocation method. *Pulido,* 934 F.2d 912 (8th Cir. 1991). The Sixth Circuit upheld the actual dollar allocation of costs, based solely on the facts in that case, but did not address the van placement issue. *Barnes,* 966 F.2d 1056 (6th Cir. 1992).

A California district court, in yet another *Aguilar/ Grand Rapids* progeny, first sided with the trial judge in *Pulido,* concluding that property boundaries have constitutional significance for placement of mobile vans. *Walker v. San Francisco Unified School District,* 761 F. Supp. 1463, 1469-71 (N.D. Cal. 1991). However, the *Walker* court rejected the *Pulido* court's reasoning on the cost allocation issue and aligned itself with those decisions upholding the constitutionality of that method of financing. *Walker,* 761 F. Supp. at 1472. The case is awaiting decision by the Court of Appeals. *Walker v. San Francisco Unified School District,* No. 92-15977 (9th Cir. *filed* May 21, 1992).[19]

That *Aguilar* and *Grand Rapids* caused havoc in the delivery of services to those most in need is demonstrated,

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[19] In *Helms v. Cody,* No. 85-5533 (E.D. La. *filed* Dec. 2, 1985), awaiting rulings on cross motions for summary judgment, plaintiffs challenge the legitimacy of any Congressional consideration of the "Felton" costs (note 18), and the continuation of an on-premises program of instruction for special needs children.

not only by their impact through litigation, but also by their detrimental effect on the administration of governmental programs. For example, as a result of *Aguilar*, participation of private school children in the Chapter 1 program dropped precipitously as school districts scrambled to provide alternative methods to deliver remedial services. Before *Aguilar*, states served about 185,000 private school students. After *Aguilar*, the number declined by 62,000 children.[20]

In addition to the decline in the quantity of private school children being served, it is generally accepted that the quality of the services is inferior to those provided pre-*Aguilar* and to those provided to public school children. This is, in part, because *Aguilar* and *Grand Rapids* created substantial logistical and educational problems in delivering Chapter 1 services to private school children.[21] Alternative delivery systems have included mobile vans parked on public streets,[22] portable classrooms on neutral sites, public school buildings, and computer assisted instruction in private schools with no instructional personnel present.[23] Requiring private school students to leave

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[20] General Accounting Office, *Aguilar v. Felton Decision's Continuing Impact on Chapter 1 Program*, (GAO/HRD-89-131BR, 1989) 5. *See also* note 17, *supra*. While the number of private school students receiving services rebounded, it still has not reached pre-*Aguilar* levels. General Accounting Office, *Additional Funds Help More Private School Students Receive Chapter 1 Services*, (GAO/HRD-93-65, 1993) 3.

[21] U.S. Department of Education, *Statement of the Independent Review Panel of the National Assessment of Chapter 1* (1993), 57.

[22] Students who receive Chapter 1 services in mobile vans have been derisively labeled "kamper kids." A. Russo, M. Haslam, *The Uses of Computer Assisted Instruction in Chapter 1 Programs Servicing Sectarian Private School Students* (U.S. Dept. of Education, 1992) 17.

[23] *Id.* at 57-58. Computer assisted instruction also has its problems. It is not well integrated with regular school programs, frequently neglects staff training and support, and is used primarily for drill and practice in basic skills. *Id.* at iii. The contribution of computer assisted instruction to students' intellectual development and improved achievement is limited. *Id.* at 23.

their regular schools and travel to locations off-site disrupts the educational process, creates safety concerns, and causes undue hardship on the children, particularly when bad weather is involved.[24] Dissatisfaction with the available alternative delivery methods is such that, as of 1990-91, in sixteen percent of the school districts, some or all private school officials and parents declined to allow their children to participate in the Chapter 1 program.[25]

The deleterious effects of *Aguilar* and *Grand Rapids* have not been limited to the Chapter 1 programs. Relying in part on *Grand Rapids*, the Fourth Circuit held, contrary to this Court's decision in *Zobrest*, that it would violate the Establishment Clause for a public school district to provide a cued speech interpreter for a deaf student attending a religious school. *Goodall v. Stafford County School Board*, 930 F.2d 363, *cert. denied*, 112 S. Ct. 188 (1991). Catholic school educators across the country have reported numerous instances in which public school officials, citing *Aguilar* or *Grand Rapids*, have refused to provide services required by IDEA to students attending religious schools. Other anecdotal evidence includes instances of local governments, again citing *Aguilar* or *Grand Rapids*, refusing to allow police officers to address students in religious schools on the perils of drug abuse. In short, *Aguilar* and *Grand Rapids* have had a restrictive impact on government officials, often resulting in unnecessary limits on the participation of religious organizations and those they serve in programs that are otherwise available to others.

Finally, and most importantly, even for those children who continue to receive services, *Aguilar*'s consistent

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[24] In one example, six second graders received 23 minutes of instructional services from a teacher in a seven foot by twelve foot space in a mobile van. At the end of the instructional time the children put on their coats and their teacher "led them out into the cloudy 10-degree day and across 100 yards of an ice-covered parking lot to return to their school." M. Haslam, D. Humphrey, *supra* note 18, at 23.

[25] *Id.* at 17.

detrimental impact is that it exaggerates the disadvantages already inflicted on the class of children most in need of remedial attention. Requiring services to be off-premises adds another layer of disruption to the educational day, requiring children to travel to alternative education sites for their remedial instruction. Such a rule can only further disadvantage these youths and further derogate the public interest in serving this group of children. After all, given the absence of a concrete threat to anyone's religious liberty or to the institutional autonomy that exists between Church and State, the Chapter 1 educational programs do not establish religion. It is a disservice to the public interest to invalidate such programs which promote real educational, economic, and civil rights values in our society, and which do not, except by speculation, establish religion.

2. *Aguilar* And *Grand Rapids* Were Themselves Wrongly Decided.

The Supreme Court long ago held that congressional action should not be invalidated absent "clear incompatibility" with the Constitution. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871). In its more recent Establishment Clause decisions, this Court has stressed that a declaration of unconstitutionality should not be predicated on mere possibilities, but only when, by realistic measure, the state is directly and substantially involved in religion. *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) (plurality). "[T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Marsh v. Chambers*, 463 U.S. 783, 795 (1983). "It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation with the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt." *Legal Tender Cases*, 79 U.S. at 531. This traditional and expected mode of constitutional analysis was not used in *Aguilar* and *Grand Rapids*.

The majority in *Aguilar* placed the burden on the State to prove that violations of the Establishment Clause would *never* happen. The State, in turn, could not prove that such violations would never happen unless they resorted to massive surveillance, a result this Court claimed would constitute excessive involvement between Church and State. *Aguilar*, 473 U.S. at 412-13. The majority blithely acknowledged that that result was a "Catch 22." *Id.* at 413. The Court was concerned that the presence of public employees in a pervasive religious environment would lead, over time, to a subversion of the public character of the program and lead, inevitably, to misuse of public funds. On this hypothetical basis, the program was declared unconstitutional.[26] Leading commentators have criticized this unusual approach:

> *Aguilar* deployed abstract separationist logic and baseless evocations of sectarian strife to strike down a benign legislative program worked out by Congress after extensive cooperative effort with and testimony from a wide variety of religious organizations. Moreover, the decision seemed to place religion, alone among human activities, in a suspect category. Normally, a litigant challenging a governmental action would have the burden of showing that the activity in question violated the Constitution. But *Aguilar* inverted the usual presumption, by striking down the remedial program because the government could not prove there would never be unconstitutional advancement of religion by public school teachers.

Glendon and Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. at 514. This inversion of constitutional presumptions did far more than cause the majority to reach the wrong result; it did immediate and unjustified damage to the educational prospects of untold thousands of disabled children in New York and throughout the country.

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[26] The remedial education program in *Grand Rapids* was also struck down by this Court by a 5 to 4 vote. *Grand Rapids*, 473 U.S. at 398-99 (O'Connor, J., concurring and dissenting). On Grand Rapids' community education program, the Court split 7-2. *Id.* at 400-01.

In her dissenting opinion, Justice O'Connor accurately noted the tremendous value that remedial education programs have to the most poor and disadvantaged children in our society. She rightly expressed concern for the educational needs of the children and the fact that the record had not shown any unconstitutionality. *Grand Rapids*, 473 U.S. at 398-99.[27] Absent some record evidence of harm, Justice O'Connor voted to sustain the programs, believing that the alleged constitutional infirmity was particularly weak. *Aguilar*, 473 U.S. at 426. Thus it is that in these two cases, *Aguilar* and *Grand Rapids*, overreaching legal theory, unaffected by any consideration of the social good to be achieved, has led to the crippling of significant and effective social programs.

One would have thought that nearly two decades' experience in a program involving hundreds and thousands of children, especially given the amount of attention to the program during nearly ten years of litigation, some situation would have come to light that might suggest an Establishment Clause violation, if any existed. Not a single instance, however, was documented. *Aguilar*, 473 U.S. at 424. As now Chief Justice Rehnquist admonished:

> The Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need.

Aguilar, 473 U.S. at 421 (Rehnquist, J., dissenting).

The road back to a sound and proper interpretation of the Establishment Clause can be guided by this Court's recent opinion in *Zobrest*, which relied upon *Bowen v. Kendrick, supra, Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*,

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[27] *See also Structural Free Exercise, supra* note 11, at 511-12.

463 U.S. 388 (1983), while rejecting a rote application of *Grand Rapids, Meek v. Pittenger*, 421 U.S. 349 (1975), and impliedly *Aguilar*.[28] 113 S. Ct. at 2468-69. In *Zobrest*, as in the cases it relied upon, the Court examined the evidence and rejected the *Aguilar/Grand Rapids* proposition that findings of unconstitutionality can be based upon unsubstantiated hypotheticals.[29] By returning to this proper mode of constitutional analysis, the Court rightly exalted substance over form ~~instead of~~ *vice versa*. *Zobrest*, 113 S. Ct. at 2469. Because *Aguilar* and *Grand Rapids* were not decided in this way, but substituted form and supposition for substance and facts, those opinions deserve to be explicitly rejected. *Cf. Aguilar*, 473 U.S. at 420 (Burger, C.J., dissenting) ("The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.").

Although implicit and explicit reliance on *Aguilar* and *Grand Rapids* in subsequent cases would suggest that some deference be accorded those opinions under *stare decisis*:

> I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in Part V of the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the ab-

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[28] "[T]he Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Zobrest*, 113 S. Ct. at 2469. It should be noted, of course, that the Kiryas Joel School District does not place employees in the religious schools; it was the presence of the Monroe-Woodbury employees in a building *adjacent* to the religious schools that the New York courts said *Aguilar* and *Grand Rapids* prohibited.

[29] Similarly in *Bowen v. Kendrick*, rather than presume the unconstitutional administration of the AFLA, the Court remanded for creation of a factual record. Justice Kennedy, joined by Justice Scalia, rejected a constitutional qualification based on the nonsectarian character of a grantee. To them what the grantee did with the program funds was dispositive. 487 U.S. at 624 (Kennedy, J., concurring).

> sence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. Experience has given greater force to the arguments of the dissenting opinions in *Meek*. . . . Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York City over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Aguilar, 473 U.S. at 427-28 (O'Connor, J., dissenting) (citations omitted). Similarly, it is time to acknowledge that *Aguilar* and *Grand Rapids* were based upon an improper mode of constitutional analysis and thus reached incorrect results. So long as *Aguilar* and *Grand Rapids* continue to be followed, interpreted and misinterpreted by lower courts, situations such as the one presented by this case will be created and recreated. State legislatures will be forced to seek solutions to seemingly intractable problems fabricated by the artificial strictures those cases have placed on government efforts to provide social and educational services to those most in need.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

MARK E. CHOPKO *
General Counsel

PHILLIP H. HARRIS
Solicitor

U.S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

* Counsel of Record

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